No. 97-1235

In the Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF MONTEREY, PETITIONER,

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND MONTEREY-DEL MONTE DUNES CORPORATION, RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici Curiae will address the following questions:

1. Whether the "rough proportionality" requirement of *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), applies to regulatory takings claims in general.

2. Whether a private property owner's sale of property to the government precludes the property owner's action for a taking.

3. Whether the Takings Clause requires close judicial scrutiny of land-use regulations effecting a substantial diminution in the value of private property, where those regulations are not generally applicable but are applied on an individualized basis through adjudicative determinations.

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE CALIFORNIA FARM BUREAU FEDERATION

INTERESTS OF THE *AMICI CURIAE*[1]

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization established in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.8 million member families. AFBF has participated as an *amicus* in this Court in support of private property rights in cases such as *Lucas* v. *South Carolina Coastal Council*, *Dolan* v. *City of Tigard*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, *Bennett* v. *Spear*, and *Suitum* v. *Tahoe Regional Planning Agency*. *Amicus* California Farm Bureau Federation is a constituent member of AFBF, representing the interests of farmers and ranchers in the State of California, where the property at issue in this case is located.

The AFBF and California Farm Bureau Federation have a direct stake in the outcome of this case. Their farmer and rancher members own or lease significant amounts of land, and their ability to use it productively is critical not only to their livelihoods, but to the nation's supply of food and other basic necessities. This land is increasingly subject to control by state and local authorities acting under statutes and ordinances such as the land-use regulations involved in this

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

case. *Amici*, therefore, have a vital interest in ensuring that the Takings Clause is interpreted fairly, so that farmers and ranchers are able to obtain just compensation when government regulation diminishing the value of their land goes "too far."

STATEMENT

In *Dolan* v. *City of Tigard*, 512 U.S. 374, 391 (1994), this Court interpreted the Takings Clause to require the government to show that any regulatory exaction of private property "is related both in nature and extent to the impact of the proposed development." This case raises the question whether *Dolan*'s "rough proportionality" standard extends to regulatory takings. In this brief, *amici* demonstrate that means-end scrutiny *at least* as rigorous as that required by *Dolan* is constitutionally mandated in all regulatory takings cases.

The property at issue (the "Dunes") consists of 37.6 oceanfront acres in the City of Monterey, California, zoned for multi-unit residential use. Pet. App. 27. In 1981, Ponderosa Homes, then the owner of the property, applied for permission to develop the Dunes into a 344-unit residential complex. This residential development complied with the City's zoning and density requirements. Nonetheless, the City's planning commission ("Commission") denied Ponderosa's proposal, suggesting that a proposal for a smaller development of 264 units would be favorably received. *Del Monte Dunes, Ltd.* v. *City of Monterey*, 920 F.2d 1496, 1502 (9th Cir. 1990) (*Del Monte Dunes I*).

Ponderosa prepared and submitted a proposal for 264 residential units. As it turned out, however, the Commission had not meant it when it led Ponderosa to believe that a 264-unit development would be approved. The Commission rejected the project in December 1983, this time telling

Ponderosa that a proposal for 224 units would be favorably received. 920 F.2d at 1502.

Once again, Ponderosa followed the Commission's instructions, submitting a proposal for 224 residential units. And once again, the Commission denied its application. On appeal, however, the City Council ("Council") ordered the Commission to consider a development of 190 units. Ponderosa subsequently submitted no fewer than four alternative site plans, each for 190 units, which the Commission rejected in July 1984. *Ibid.*

In September 1984, the Council again overruled the Commission and approved one of Ponderosa's 190-unit site plans, subject to 15 conditions (related principally to access, environmental issues, and architectural review) to be satisfied within 18 months. The Council expressly found "'that the site plan as proposed is conceptually satisfactory and is in conformance with the previous decisions of this Council regarding density, number of units, location on the property, and in other respects.'" *Id.* at 1503. The Council also approved the proposed access route, which Ponderosa had modified to conform to the City's wishes. *Ibid.*

Over the next 18 months, respondents (collectively, "Del Monte"), which purchased the Dunes shortly after Ponderosa submitted the 190-unit application, prepared plans that complied with the City's stated conditions. Del Monte received approval from the Architectural Review Committee, after its review of such factors as exterior and interior design and the number, size, and shape of the subdivision's roads, parkways, and parking facilities. In August 1985, the Commission's professional planning staff also recommended approval. The staff stated that "'it appears that the conditions of approval have been addressed and substantially met by the applicants' tentative map.'" *Id.* at 1504. The Commission's staff further reported that the development's design was

(i) "consistent with the objectives, policies, general land uses, and programs of the City's adopted General Plan and Del Monte Land Use Plan"; (ii) "not likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat"; and (iii) "not [in] conflict with easements acquired by the public at large for access through or use of [the] property." 920 F.2d at 1504.

The Commission nonetheless denied the proposal, and the Council concurred. The Council did not base its decision on Del Monte's failure to meet any of the 15 conditions specified in the Council's earlier resolution. Nor did the Council "base this conclusion on any facts brought out by its staff or at the hearing." Rather, the Council cited "generalized findings" about the environment and access. *Id.* at 1505.

For example, although the Council had earlier found that Del Monte's site plan was "conceptually satisfactory and * * * in conformance with [its] previous decisions * * * regarding density, number of units, location on the property, and in other respects" (920 F.2d at 1503), it now found that "[t]he site is not physically suitable for the type and density of development proposed." *Id.* at 1504. Similarly, although the Council earlier had approved Del Monte's plans for access to the property—which Ponderosa had modified in response to the Council's request—it now proposed an entirely different access route, over the land of a neighboring owner. *Id.* at 1505. And although the Council did not dispute that it earlier had approved Del Monte's environmental restoration plan, that the U.S. Fish & Wildlife Service had registered no objection to the development, or that Del Monte had set aside 17 acres of habitat for the Smith's Blue Butterfly, it suddenly found that Del Monte had failed to provide adequate assurance that the Smith's Blue Butterfly would be protected. *Id.* at 1506; Pet. App. 17. In short, "the same three members of the city council that had approved the development with certain conditions abruptly changed course

and disapproved the plan even though the conditions specified had been substantially met." 920 F.2d at 1506.

Subsequently, the State of California bought Del Monte's property. The State paid more for the property than Del Monte had paid for it—but considerably less than its value as a development parcel. The State turned the property into a public "butterfly park." *Id.* at 1509.

Respondent then filed suit in district court, alleging that the City's denial of its proposed development violated the Takings and Equal Protection Clauses. On remand to the district court following the litigation in *Del Monte Dunes I*, the district court ordered those claims tried to a jury. The jury returned a verdict in Del Monte's favor on both claims, awarding it $1,450,000. The Ninth Circuit affirmed.

The Ninth Circuit rejected the City's claim that the evidence was insufficient to support the takings verdict. Noting that a party can prevail on its takings claim under two distinct theories—either by proving that the challenged "land-use regulation does not substantially advance legitimate state interests" or by proving that it "denies an owner economically viable use of his land"—the court found sufficient evidence to support each theory. Pet. App. 16. With respect to the first theory, the court held that there was ample evidence for the jury to find no reasonable relationship between the City's stated objectives and its actions. Given the City's abrupt change of position, a jury easily could have concluded "that the City's reasons for denying [Del Monte's] application were invalid and that it unfairly intended to forestall any reasonable development of the Dunes." Pet. App. 19. With respect to the second theory, the court held that where "government action relegates permissible uses of property to those consistent with leaving property in its natural state (*e.g.*, nature preserve or public space), and no competitive market exists for the property without the

possibility of development," the jury may reasonably find a taking. Pet. App. 23.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Takings Clause requires strict scrutiny of all land-use regulations that substantially diminish the value of private property. The text, history, and constitutional role of the Takings Clause demonstrate that government may not, merely by asserting a "legitimate state interest," deprive individuals of their property without paying just compensation. Because this Court has recognized that the Takings Clause is not intended merely to prevent physical intrusions upon private property, but also to limit regulatory interferences with property rights, it makes no sense to hold that compelled dedications of real property are the only form of land-use regulation subject to heightened means-end scrutiny. This Court should hold that *at least* the exacting scrutiny required by *Dolan* extends to all types of regulatory takings.

2. Irrespective of the applicability of *Dolan,* the record supports affirmance on the alternative basis that the City's actions deprived Del Monte of "all economically viable use of its property." The United States errs when it suggests that the State's purchase of the Dunes, for a price greater than Del Monte originally paid for the land, precludes such a finding. That argument wrongly focuses on whether government has deprived private property of all of its *value*, rather than whether regulation has prevented its profitable *use*. Moreover, it erroneously assumes that only a *complete* elimination of property value amounts to a taking, whereas a substantial diminution in value may also constitute a compensable taking. To allow government to avoid market-value compensation for a taking simply by purchasing the property for a dollar more than was paid for it would create a perverse incentive for government to use restrictive land-

use regulations to force land sales and obtain property for far less than its market value.

3. Courts appropriately apply exacting scrutiny to government decisions the effect of which is concentrated on discrete groups or individuals. Such scrutiny is required here: the City is vested with broad discretion in the application of its zoning laws, and decisions whether to grant variances are made on a case-by-case basis. Del Monte has been singled out among area landowners and effectively forced to create a public "butterfly park." However desirable the City's environmental goals may be, the Fifth Amendment mandates payment of just compensation if Del Monte is to contribute its property to the City's cause.

ARGUMENT

For the framers of our Constitution, private property supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). The Framers understood the protection of property rights—rights in land in particular—as "the first object of government." *The Federalist No. 10*, at 78 (James Madison) (C. Rossiter ed., 1961).

The Takings Clause lies at the heart of the constitutional scheme to protect private property rights from the grasp of transient political majorities; it was carefully crafted "to bar Government from forcing some people alone to bear burdens which, in all fairness, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Although the Constitution grants government the power to deprive a person of property for a public purpose, the exercise of that power is strictly conditioned upon the payment of just compensation.

In this case, Monterey sought to circumvent the just compensation requirement by gamesmanship with its land-use regulations. Rather than exercise its right of eminent domain over Del Monte's beachfront property, the City instead used its regulations to force Del Monte to create a public "butterfly park." To its credit, the jury recognized this for what it was. The jury properly understood that a regulatory deprivation of property rights must be carefully scrutinized to ensure proper application of the Takings Clause. The prominence of private property rights in our constitutional structure—as well as this Court's precedents—make clear that the jury and the court below got it right.

I. LAND-USE REGULATIONS THAT SUBSTANTIALLY DIMINISH THE VALUE OF PROPERTY ARE SUBJECT TO CLOSE JUDICIAL SCRUTINY UNDER THE TAKINGS CLAUSE

The United States urges this Court to endorse the same sort of "rationality or reasonableness review" in takings cases that is applied "[i]n a variety of contexts" ranging from due process "challenges to economic regulation" to cases brought "under the Equal Protection Clause." *Amicus* Br. of the United States 17. According to the United States, landowners may recover compensation only if a land use regulation fails to satisfy "deferential" lower-tier scrutiny. *Id.* at 20. Lower-tier scrutiny, however, would gut the Takings Clause. It is wholly inconsistent with the text, history, and purpose of the just compensation requirement, which demand exacting scrutiny comparable to that directed at government action that infringes on other fundamental constitutional rights. *At a minimum*, such scrutiny requires that government pay compensation when land-use regulations substantially diminish the value of property, unless the regulation is a reasonably proportionate response to some compelling governmental concern, such as the abatement of a nuisance on the property.

A. The Takings Clause Does Not Contemplate Deferential Scrutiny

To permit states and municipalities to deprive private citizens of their property without compensation simply to "advance legitimate state interests" would strip the Takings Clause of its central purpose of preventing redistribution of private property by transient political majorities. It is indisputable that "such a justification can be formulated in practically every case." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992); see also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting) ("nearly every action the government takes" can be characterized as preventing some grave public harm). As a practical matter, then, scrutiny of government action to see if it is rationally related to a legitimate state interest is tantamount to no scrutiny at all. Justice Holmes warned of this result in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922):

> When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The text, history, and central constitutional role of the Takings Clause demand much more exacting scrutiny of land-use regulations. That provision unambiguously states that "private property [shall not] be taken for public use, without just compensation." For the common good, government may deprive a person of property—but only upon payment of just compensation. To hold that the requirement of just compensation does not apply where a taking serves a legitimate public purpose would effectively *repeal* the

Takings Clause, for that Clause *presumes* that the government is taking property "for public use."

The history of the Takings Clause confirms that is supposed to have more teeth. The payment of compensation when government took property for the common good was "a principle of the common law * * * of immemorial usage" (W. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 583 (1972)), and continued "protection of private property was a nearly unanimous intention among the founding generation." M. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 270 (1988). See generally J. Story, *Commentaries on the Constitution of the United States* 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it could conjure up some argument that the exaction was "reasonable."

To the contrary, the Framers regarded protection of individual property rights as a central goal of government. "Government," wrote James Madison, "is instituted no less for protection of the property than of the persons of individuals." *The Federalist No. 54*, at 339 (C. Rossiter ed., 1961). The Framers would have been shocked at the notion that just compensation is unnecessary if government action survives lower-tier-type scrutiny.

The Takings Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally mandated compensation that would have to be paid for the taking. Property can always be taken for the common good—provided the government is willing to pay the bill. Hence the distrust of government underlying our constitutional structure of separated

powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check the excessive zeal of regulatory bodies. The Takings Clause, moreover, requires the government to treat individuals with dignity by ensuring that, if government takes their property, it compensates them for that intrusion.

Finding "'no warrant in the laws or practices of our ancestors'" for governmental "'authority [to] inva[de] private right under the pretext of the public good'" (*United States* v. *Lynah*, 188 U.S. 445, 470 (1903)), this Court has long recognized that the Takings Clause is designed to shield individual rights from government action that would convert one person's property to community use. See *Armstrong*, 364 U.S. at 49; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) (the Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). Lower-tier scrutiny of land-use regulations is inconsistent with this purpose. The teaching of the Takings Clause is that where public benefits are achieved by depriving individuals of property, the costs "must be borne by all [of a community's] taxpayers [and not] imposed entirely on the owners of the individual properties." *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting). The cardinal principle that should guide its interpretation is that government may *not* sacrifice the interests of some to benefit others: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416; see also *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841-842 (1987).

B. Deferential Scrutiny Is Inconsistent With This Court's Recent Precedents

This Court has repeatedly rejected the argument, advanced here by the United States, that its scrutiny of takings claims is synonymous with the "rational basis" scrutiny that governs substantive due process and equal protection claims. In *Nollan*, 483 U.S. at 834, 835 n.4, the Court, in explicating "the standards for determining * * * what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter," stated:

> Contrary to Justice Brennan's claim, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective." Justice Brennan relies principally on an equal protection case and two substantive due process cases in support of the standards he would adopt. But there is no reason to believe * * * that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

Likewise, in *Dolan*, this Court expressly refused to adopt the "reasonable relationship" test advocated by the United States, reasoning that such a standard would be "confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." 512 U.S. at 391. As this Court recognized, the "strong presumption of constitutional validity" applicable when land-use regulations are challenged on equal protection or due process grounds does not apply in cases challenging such regulation as violative of the Takings Clause. *Id.* at 392.

Viewed in terms of their practical effect on landowners, there is no basis for subjecting government "exactions" or "dedications" of the sort at issue in *Dolan* to heightened scrutiny, while sustaining even the most severe applications of other land-use regulations just because they loosely serve legitimate state interests. Repeated denials of a landowner's revised applications to develop a parcel of property—especially where, as here, the denials are not based on express terms in the municipality's land-use code, but on unwritten, discretionary, and ever-changing bases—can interfere with the profitable use of land just as harshly as dedications or exactions. Mrs. Dolan, after all, still could have used her land for a new hardware store even if 10% of it had been taken for a bike path; Del Monte, in contrast, has been deprived of *any* economically beneficial use of its land.

C. The City's Actions Do Not Withstand The Close Judicial Scrutiny Mandated By The Takings Clause

Monterey's actions cannot survive strict means-end scrutiny. The City sought to justify its denials of Del Monte's numerous development proposals on the basis of "generalized findings" about the environment and access (*Del Monte Dunes I*, 920 F.2d at 1505), but never even attempted to demonstrate that its actions were proportional to "the impact of the proposed development" (*Dolan*, 512 U.S. at

391), let alone that they were justified by California nuisance law (*Lucas*, 505 U.S. at 1029). As the jury recognized, the City's conduct—in repeatedly denying Del Monte's revised development applications, while permitting "other properties surrounding the Dunes [to be] developed into residential units similar to the development proposed by [Del Monte] but without the environmental and access conditions" (*Del Monte Dunes I*, 920 F.2d at 1508)—completely belies any claim that it acted proportionally to an identified harm or was responding to the threat of a nuisance. In short, the City cannot impose its land-use regulations in this manner without paying just compensation.

II. THE STATE'S PURCHASE OF DEL MONTE'S PROPERTY DOES NOT PRECLUDE A FINDING OF A TAKING

The principal focus of the briefs of the City and its *amici* is the (erroneous) claim that *Dolan*'s "rough proportionality" standard does not apply outside the context of regulatory exactions. See, *e.g.*, Pet. Br. 44-49; *Amicus* Br. for United States 10-15. Those briefs, however, largely ignore an alternative ground for affirmance: the Ninth Circuit's finding that the jury could reasonably have concluded that Del Monte was deprived of "all economically viable use of its property." Pet. App. 20. The United States does suggest that the State's purchase of the Dunes for conversion to a public park precludes such a finding—as if Del Monte, in acquiescing to the State's offer, was choosing the best of several profitable alternatives, instead of clutching a last opportunity to obtain *something* for a piece of property made useless, and of no interest to any other buyer, by the City's actions. *Amicus* Br. for United States 8. The Solicitor General's suggestion, however, is untenable.

The proper focus of inquiry is not whether the government has deprived a property owner of all *value* of his

property, but whether it has deprived him of all economically viable *use*. *Lucas*, 505 U.S. at 1017. As this Court has observed, regulation that "forever denies the owner any power to control the *use* of [its] property" is "perhaps the most serious form of invasion of an owner's property interests." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 436 (1982) (emphasis added); see Pet. App. 22 ("Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value"). And as Justice Scalia put it in his concurring opinion in *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1671-1672 (1997), "[i]f money that the government regulator gives to the landowner can be counted on the question of whether there is a taking (causing the courts to say that the land retains substantial value, and thus has not been taken), rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less." Whether Del Monte received more than it paid for the Dunes may be relevant in determining whether it received just compensation, but it is not relevant to the determination of whether Del Monte was deprived of "all economically viable use of its property."[2]

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[2] In a normally competitive market, property values reflect the potential uses of property. But where, on account of highly restrictive land-use regulations, the government is the sole party interested in purchasing a parcel of property, it makes little sense to consider the price paid by the government in determining whether its actions constitute a taking. See *Suitum*, 117 S. Ct. at 1671 (Scalia, J., concurring) ("a cash payment from the government [does] not relate to whether the regulation 'goes too far' (*i.e.*, restricts use of the land so severely as to constitute a taking), but rather to whether there has been adequate compensation for the taking").

"[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—[suggest] that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018. In light of Monterey's zoning classification (which precludes *other* uses of Del Monte's property (Pet. App. 26-27)), the City has stripped Del Monte's property of economically viable use. See *Lake Nacimiento Ranch Co.* v. *County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1988) ("Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property"); *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (characterizing the "economically viable use" inquiry as: "Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available?"). The record supports affirmance on that basis—without regard to the applicability of *Dolan* in this context.

Even if the value of Del Monte's property were the relevant calculus, the argument that the State's purchase of the property necessarily means that no taking has occurred wrongly assumes that *only* a complete elimination of value constitutes a taking. To be sure, the *Lucas* Court held that land-use regulation that deprives a landowner of "*all* economically beneficial or productive use of [the] land" constitutes a taking and is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." 505 U.S. at 1015. Contrary to the United States' assumption, however, this form of "categorical" taking is not the only form of taking proscribed by the Fifth Amendment. *Lucas*'s "categorical rule that total takings must be compensated" does not operate to the exclusion of the principle that

a substantial diminution in value can also be a compensable partial taking. See *id.* at 1026.

In fact, this Court in *Lucas* expressly rejected the dissent's contention that the categorical rule was arbitrary because "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." 505 U.S. at 1064 (Stevens, J., dissenting). The Court observed that "[t]his analysis errs in its assumption that the landowner whose deprivation is one step short of completion is not entitled to compensation." *Id.* at 1019 n.8. The Court noted that "[s]uch an owner might not be able to claim the benefit of our categorical formulation," but "'[t]he economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Ibid.* (citation omitted).

Although this Court has not yet had occasion to flesh out the partial takings inquiry outlined in *Lucas*, the Federal Circuit has squarely addressed it, concluding that substantial diminutions in value may amount to compensable takings. See *Florida Rock*, 18 F.3d at 1567-1569 (Fed. Cir. 1994) (finding that a taking may have occurred when the value of land was reduced by approximately sixty percent). The Federal Circuit correctly noted that "[n]othing in the language of the Fifth Amendment compels a court to find a taking *only* when the government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." *Id.* at 1568.

Compelling policy reasons support reading the Takings Clause to require payment of just compensation for a taking even where the government has purchased the property for a higher price than the owner originally paid for it but for

less than its fair-market value for development or other commercial or agricultural uses. As the Ninth Circuit reasoned, "[f]ocusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry." Pet. App. 22. And, as the Court of Claims has observed, a property owner's receipt of offers "does not establish that there exists a solid and adequate fair market value," particularly where the offers received "were for far less than the value of the property" and "were not the product of negotiations between a willing buyer and seller under no duress." *Formanek* v. *United States*, 26 Cl. Ct. 332, 340 (1992).

More importantly, permitting the government to avoid liability for a taking solely because it purchased the subject property for more than was paid by the former owner would create a perverse system of incentives. A government body desirous of obtaining private land for public projects could simply regulate away the property's viable commercial uses and, having thereby driven off all potential buyers, offer to purchase the parcel for some minimal amount over what the owner paid. An owner who accepted that offer would, according to the Solicitor General, lose any right to recover through a takings action the fair market value of the property for reasonable commercial development. The Ninth Circuit was surely correct in holding that "the mere fact that there is one willing buyer of the subject property, particularly where that buyer is the government, does not, as a matter of law, defeat a taking claim." Pet. App. 23. The government should not be able to use restrictive land-use regulation as a

means of circumventing the requirement of just compensation and buying private property at a steep discount.[3]

Under the ad hoc test of *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), "[t]he economic impact of the regulation" and "the extent to which the regulation has interfered with distinct investment-backed expectations" are important factors in determining whether a regulation effects a taking. Here, those factors strongly support the jury's determination: Del Monte reasonably expected, upon its purchase of the Dunes, that it would be able to build some sort of multi-unit residential development on its property. The City interfered with those expectations, and Del Monte has borne the economic impact—to the tune of $1,450,000—of its regulation. See *Florida Rock*, 18 F.3d at 1564 (*Lucas* "teaches that the economic impact factor alone may be determinative"). On this basis, too, affirmance is required.

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[3] See also *Argier* v. *Nevada Power Co.*, 952 P.2d 1390, 1391 (Nev. 1998) (rejecting the "claim[] that the conveyance of the property to the county terminated its duty to pay the [former owner] just compensation" for a taking); *Brooks Investment Co.* v. *City of Bloomington*, 232 N.W.2d 911, 918 (Minn. 1975) ("Where the governmental body does take possession of the property or damages it so as to deprive the owner of possession prior to the sale, the original owner is entitled to [compensation]" because, "[i]f the rule were otherwise, the original owner of [the] property would suffer a loss and the purchaser of that property would receive a windfall"); *City of Los Angeles* v. *Ricards*, 515 P.2d 585, 587 (Cal. 1973) (noting that "the right to recover [any resulting depreciation of taken property] remains in the person who owned the property at the time of the taking or damaging, regardless of whether the property is subsequently transferred to another person").

III. THE CITY BEARS THE BURDEN OF JUSTIFYING THE APPLICATION OF ITS LAND-USE ORDINANCES TO DEL MONTE'S PROPERTY

Citing *City of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), a number of the City's *amici* contend that this Court should defer to the decision of the City on the ground that it is simply applying "generally applicable" land-use regulations, the burdens and benefits of which are shared by the community at large. See, *e.g.*, Brief of the City & County of San Francisco et al. 16, 21.

To be sure, the rationale of *Euclid* is that where a zoning ordinance applies generally and imposes like burdens on "a majority of citizens," there is little justification for judicial intervention, because the generality of the regulation ensures an average reciprocity of advantage, and because property owners have "recourse * * * to the ballot." 272 U.S. at 388, 393 (quotation omitted). As the *Dolan* Court explained in distinguishing *Euclid*, however, there is a crucial difference between "essentially legislative determinations classifying entire areas of the city," and "an adjudicative decision to condition [a property owner's] application for a building permit on an individual parcel." 512 U.S. at 385. In the latter circumstance, the Court held, "the burden [of justifying its application of the ordinance] properly rests with the city." *Id.* at 391 n.8; see *ibid.* (citing *Euclid* for the proposition that "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation").[4]

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[4] See also *Amicus* Br. for United States 29, in *Dolan* v. *City of Tigard*, No. 93-518 (conceding that "the Takings Clause limits the government's freedom to single out particular individuals to absorb the costs of public improvements" and that "the breadth of the affected class and the degree of disparity in treatment among landowners are crucial" factors in this determination).

In constitutional law generally, courts appropriately pay attention to how diffusely the impact of government action is felt within the community. Where the impact of a law is concentrated on a discrete group of individuals, popularly elected representatives lack adequate incentive to determine whether the law strikes a fair balance between the interests of the community at large and those of the persons burdened by its application. See *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Thus, the Free Exercise Clause proscribes "'prohibition[s] that society is prepared to impose upon [religious minorities] but not upon itself'" (*Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 545 (1993)), but does not affect "neutral law[s] of general applicability" resulting from the normal "political process" in our "democratic government." *Employment Division* v. *Smith*, 494 U.S. 872, 879, 890 (1990). Likewise, the Court has readily sustained free speech challenges to taxes that "singl[e] out the press," reasoning that "the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened" in such circumstances, while rejecting free speech challenges to taxes of general applicability, reasoning that there is little cause to "fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (invalidating a tax targeted at the press); see also *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991) (sustaining a generally applicable sales tax as applied to the press). It is naive to think that simply because the government is regulating property rights —and not rights of expression, free exercise, privacy, or

others deemed fundamental in our society—its individualized, discretionary determinations carry less potential for abuse of power and judicial protection is less necessary.

The decision complained of bears all the hallmarks of an adjudicative (as opposed to legislative) determination. For any proposed development, California law requires the submission and approval of a "tentative map"—a drawing that sets forth the project's design and site conditions—prior to development. Cal. Gov't Code §§ 66410, 66499.58. An advisory board (here, the Commission) initially reviews the map and suggests a disposition (*id.* § 66452.1), but the local body responsible for land-use decisions (here, the Council) is free to reject its recommendations—whether it ultimately approves, conditionally approves, or denies the tentative map (*id.* § 66452.2). Thus, the City of Monterey is vested with broad discretion in the application of its land-use regulations, and the decision whether to grant a variance is made on a case-by-case basis after review by two distinct bodies. That kind of determination hardly qualifies as a law "classifying entire areas of the city." *Dolan*, 512 U.S. at 385.

Del Monte and Ponderosa submitted no fewer than four development applications to the City, and received a detailed review setting forth fifteen conditions for approval of the development. In the end it was the dispute over compliance with the fifteen conditions—which applied *solely* to Del Monte's proposal—that precipitated this litigation.

It cannot seriously be contended in these circumstances that Del Monte's proposed development has been subjected to "generally applicable" regulation. As clearly evidenced by the City's treatment of similarly situated landowners, Del Monte has borne a grossly disproportionate share of the burdens of Monterey's land-use regulations. As the Ninth Circuit observed, "other properties surrounding the Dunes have been developed into residential units similar to the

development proposed by [Del Monte] but without the environmental and access conditions imposed by the City" (920 F.2d at 1508), and Del Monte presented ample evidence from which a jury could conclude "that the City arbitrarily and unreasonably limited use and development of [its] property and set aside open space for public use, whereas owners of comparable property along the Monterey Bay were not subjected to these conditions and restrictions." *Id.* at 1508-1509. Stated simply, Del Monte was "singled out to bear the burden of the City's attempt to bring back the Smith's Blue Butterfly by creating a 'butterfly park' on the majority of [its] land." *Id.* at 1509. That is not generally applicable regulation.[5]

In sum, this is a case in which Monterey has forced a single landowner "to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Because "prohibitions that society is prepared to impose upon [isolated individuals like respondents] but not upon itself" are the "precise evil" that "the requirement of general applicability is designed to prevent" (*Church of Lukumi Babalu Aye*, 508 U.S. at 545), the most exacting review is wholly appropriate, lest the "Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment, be relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392.

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[5] See also *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 132 (1978) (defining "reverse spot" zoning as "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treament than the neighboring ones").

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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